
(1957) 07 CAL CK 0006
In the Calcutta High Court
Case No : Civil Revn. No. 1487 of 1956

Ram Chandra Ram Nag Ram Rice and Oil Mills Ltd.	APPELLANT
Vs	
Howrah Oil Mills Ltd. and Another	RESPONDENT

Date of Decision : 02-07-1957

Acts Referred:

Arbitration Act, 1940 — Section 2, 34, 35, 8, 9
Contract Act, 1872 — Section 226

Citation : AIR 1958 Cal 620 : 62 CWN 773

Hon'ble Judges : S.C. Lahiri, J;B.K. Guha, J

Bench : Division Bench

Advocate : A.D. Mukherjee, Kanak K. Ghose and S.K. Basu, for the Appellant;
E.R. Meyer and N.C. Talukdar, (for No. 1) and Somendra Nath Mukherjee, (for No. 2), for the Respondent

Final Decision : Dismissed

Judgement

S.C. Lahiri, J.—The plaintiff which is a limited Company has obtained this Rule against an order of the District Judge of Howrah affirming on appeal an order made by the First Subordinate Judge of Howrah u/s 34 of the Indian Arbitration Act of 1940. The plaintiff sued for the recovery of a sum of Rs. 4233-11-6 alleged to be due to it as the balance of price of goods sold and supplied to defendant No. 1 on the basis of various contracts entered into on diverse dates in the year 1942. According to the plaintiff, the defendant No. 1 is the buyer of goods and defendant No. 2 acted as the agent of defendant No. 1. The suit was originally filed on 21-7-1945, in the court of the 1st Subordinate Judge of Gaya and registered as Money suit No. 90 of 1945. After passing through various stages the suit was ultimately taken up for hearing on a preliminary issue as to whether the 1st Subordinate Judge of Gaya had territorial jurisdiction to entertain the suit. By an order dated the 22nd July, 1954, the Subordinate Judge of Gaya came to the conclusion that he had no territorial jurisdiction to entertain the suit and he accordingly returned the plaint for presentation to the proper court. Thereafter on 2-8-1954, the plaintiff refiled the plaint in the Court of the

Subordinate Judge of Howrah. The defendant No. 1 filed an application for stay of the suit u/s 34 of the Indian Arbitration Act alleging that the contracts under which goods were sold contained an arbitration clause. Both the courts below have granted that prayer and against that order the plaintiff has obtained the present Rule.

2. Mr. Mukherjee appearing in support of the Rule has raised various points before us. The first point raised by Mr. Mukherjee is that it cannot be said that there was any arbitration agreement between the plaintiff and the defendant No. 1 and consequently the courts below acted without jurisdiction in making an order of stay u/s 34 of the Indian Arbitration Act. The contract in this case was entered into by the delivery and acceptance of bought and sold notes to the buyer and seller respectively. The bought notes delivered by the broker to me defendant No. 1 have been produced by them but the sold notes, though produced by the plaintiff in the Gaya Court, have not been produced in the Howrah Court, and both the Courts have drawn an adverse inference against the plaintiff for the non-production and have held that the sold notes, if produced would have shown that they are the counter parts of the bought notes which have been produced by the defendant No. 1. The bought notes which have been produced by the defendant No. 1 contain an arbitration clause which runs as follows: "All disputes regarding the contract are to be settled by two Arbitrators one nominated by buyers and one nominated by sellers respectively in accordance with the Indian Arbitration Act in Calcutta". The bought notes which have been produced by the defendant No. 1 also show that they are signed by the broker only and so it may be inferred that the sold notes were similarly signed by the broker only. From this fact Mr. Mukherjee at one stage sought to argue that the acceptance of these bought and sold notes by the buyer and seller respectively at best created a contract between the buyer and the broker on the one hand and the seller and the broker on the other, and that it did not create any privity of contract between the buyer and the seller. When, however, it was realised that this argument would strike at the very foundation of the plaintiff's claim against the defendant No. 1, it was abandoned. It was, however, still argued that the contract did not create an arbitration agreement between the plaintiff and the defendant No. 1 within the meaning of the Arbitration Act. Reliance was placed on the definition of "arbitration agreement" as given in Section 2(a) of the Indian Arbitration Act, and it was argued that in order to constitute an arbitration agreement, the agreement must be signed by both the parties. This view was taken in certain English cases which were followed by Page, J., in the case of John Batt and Co. (London), Ltd. Vs. Kanoolal and Co., . This view, however, was expressly dissented from by a Division Bench presided over by Rankin, C. J., in the case of Radha Kanta Dass Vs. Baerlein Bros. Ltd., . After referring to the view taken by Page, J. in John Batt's case (A), Sir George Rankin observed as follows :

"In my judgment, the law is the other way. The Arbitration Act of 1889 and the Indian Arbitration Act, for the best of good reasons have not required that the

agreement to submit should be signed by both parties."

The same view was taken in the case of Chandi Prasad Misir Vs. Balaji Misir and Others, . In the case of Keshoram Cotton Mills v. Kunhyalal Bagwani 44 CWN 607 (D), Panckridge, J. also followed this view. It is true that all these decisions were under the Indian Arbitration Act of 1899, but that does not make any difference, because the definition of the word "submission" in Section 4, Clause (b) of the Arbitration Act of 1899, is identical with the definition of the words "arbitration agreement" in Section 2(a) of the Indian Arbitration Act of 1940. Mr. Mukherjee pressed us to dissent from the view taken by Rankin, C.J. in Radha Kanta Dass Vs. Baerlein Bros. Ltd., , and to refer this question to a Full Bench. But it seems the matter is now clinched by subsequent authorities. Mr. Meyer has placed before us the decision of the East Punjab High Court in the case of Firm Mangal Chand v. Firm Pyare Lal AIR 1949 E. P. 199 (E), where Mahajan, J., after an exhaustive review of all the English and Indian authorities on the point held as follows :

"The result of the above discussion is that it can be safely said that at the present moment both in England and in India the law is well settled. When Section 2(a), Arbitration Act of 1940, speaks of an agreement in writing all that it seems is that the terms of the agreement should be expressed in writing and that the agreement should be such that it binds both the parties and that the actual signatures of both the parties on the agreement are not essential. The agreement may be in the form of a signed document by both the parties containing all the terms or a signed document by one party containing the terms and a plain acceptance, signed or orally accepted by other party, or it may be an unsigned document containing the terms of a submission to arbitration agreed to orally by both the parties. It is sufficient if one party signs the submission and the other accepts it. The acceptance may be by word of mouth or may be by conduct."

Finally, in the case of Jugal Kishore Rameshwardas Vs. Mrs. Goolbai Hormusji, , the Supreme Court has held that it is settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties, and that it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established. In view of the pronouncement of the Supreme Court, it is unnecessary for us to consider the question further. We are bound to hold that in order to constitute an agreement in writing within the meaning of Section 2(a) of the Indian Arbitration Act, it is not necessary that the agreement should be signed by both the parties. All that is necessary is that the parties should accept the terms of the agreement. The acceptance may be in writing or by conduct or by oral agreement. It is, therefore, necessary to see if the plaintiff in the present case accepted the terms which contain an arbitration clause. The plaintiff parted with its goods upon the sold notes delivered to it by the broker. The very fact that the plaintiff retained the sold notes and parted with its goods shows that it accepted all the terms of the sold notes. It was open to the plaintiff

to refuse to part with its goods upon the sold notes, but it is not open to it to retain the sold notes and part with the goods and at the same time claim that it is not bound by the terms. These sold notes again were signed by the broker who, according to the statement in paragraph 2 of the plaint, was acting as the agent of defendant No. 1. So, the position is this : the plaintiff delivered the goods upon certain terms containing an arbitration clause which was reduced to writing and signed by the agent of defendant No. 1. This, in my opinion, amounts to acceptance of all the terms contained in the sold notes and constitutes an arbitration agreement within the meaning of Section 2(a) of the Indian Arbitration Act. It is idle to contend that the terms contained in the bought and sold notes were merely broker's intimation communicated to the parties after the conclusion of the contract. There can be no question that the terms contained in these bought and sold notes constituted the very foundation of the contract upon which the plaintiff rests its claim. The first point raised by Mr. Mukherjee must accordingly be overruled.

3. The 2nd point argued before us is to the effect that the dispute in the present case is not covered by the arbitration clause. It is contended that the provision in the arbitration clause to the effect that all disputes regarding the contract means and includes only disputes relating to the interpretation of the terms and conditions of the contract and does not cover a claim under the contract. I do not see any force in this argument. "All disputes regarding this contract," in my opinion, includes not only disputes relating to the interpretation of the terms and conditions of the contract, but also includes all claims arising under the contract. In the plaint the plaintiff takes care to set out in paragraphs 5 and 6 of the plaint the terms of the Contract relating to the payment of 90 per cent, of the price against railway receipts and the balance after weighment, and the plaintiff's case is that the defendant No. 1 wrongfully refused to pay the 10 per cent, of the price which remained due to the plaintiff. In my opinion there is no doubt that this claim is covered by the arbitration clause. The 2nd point must accordingly be overruled.

4. Mr. Mukherjee also made a faint attempt to bring the case within the principles of a decision of this Court in the case of *Johurmull Parasram and Others Vs. Louis Dreyfus and Co. Ltd.* . That was a case where the plaintiff instituted a suit not on the basis of any contract containing any arbitration clause, but for the reasonable price of goods sold and delivered de hors the contract. In that case Harries, C.J. and Mukherjea, J., held that such a suit could not be stayed u/s 34 of the Indian Arbitration Act of 1940. Looking at the allegations made by the plaintiff in the present case, however, it is quite clear to me that in this case the plaintiff bases his claim entirely upon the contract. The statements in paragraphs 2, 3, 4, 5, 6 and 7 of the plaint make it quite clear that the plaintiff is suing for the recovery of the balance of the price due to it upon contracts entered into on diverse dates in the year 1942. I, therefore, cannot see how it can be said that this case is to be governed by the principles laid down by Harries, C.J. in the cause of *Johurmull Parasaram*.

5. The 3rd point which has been raised by Mr. Mukherjee before us was not raised in any of the Courts below and it is based upon certain statements made by the defendant No. 1 in the application for stay u/s 34 of the Indian Arbitration Act. Mr. Mukherjee contends that as this question arises upon the very allegation made by defendant No. 1 in the application, we should allow him to raise it for the first time in this Court and we have allowed him to raise this point before us. The defendant No. 1 in the application u/s 34 stated in paragraph 12 that by a letter dated 7-7-1951, the defendant No. 1 intimated to the plaintiff that the defendant No. 1 had nominated an arbitrator in accordance with the terms of the contract and requested the plaintiff company to nominate its arbitrator for deciding all disputes and differences arising out of the contract. In spite of that, Mr. Mukherjee argues, the defendant No. 1 did not take any steps to file an application according to the provisions of Section 8(2) of the Indian Arbitration Act. Sub-section 2 of Section 8 provides that if an appointment is not made by the other party within 15 days after service of the notice, the Court may, on the application of the party who gave the notice, appoint an arbitrator; but the reference to Section 8 of the Indian Arbitration Act, appears to me to be wholly misconceived. That section applies where an arbitration agreement provides that the reference "shall be to one or more arbitrators to be appointed by consent of the parties." In the case before us, however, the arbitration clause provides that the arbitration shall be by two arbitrators, one to be nominated by the buyer and the other to be nominated by the seller. In this case, there is no question of one or more arbitrators being appointed by the consent of all the parties. Consequently, Section 8 can have no possible application to this case. Mr. Mukherjee then argued that under Clause (b) of Section 9 which evidently applies to the facts of this case, it was the duty of the defendant No. 1 to take steps for proceeding with the arbitration by the arbitrator who had been appointed by them, and in view of the fact that no steps have been taken by the defendant No. 1 for proceeding with the arbitration in spite of the letter dated 7-7-1951, it should be held that the defendant No. 1 has no right to proceed with the arbitration agreement. With regard to this argument, it is to be noticed that it was impossible for the defendant No. 1 to take steps for proceeding with the arbitration in view of the provisions of Section 35 of the Indian Arbitration Act. I have already stated that the suit was pending in the Court of the Subordinate Judge of Gaya from 21-7-1945 up to 22-7-1954, and shortly thereafter the plaintiff refiled the plaint in the court of the Subordinate Judge, Howrah, and unless the defendant No. 1 got an order of stay u/s 34, it was impossible for them to proceed with the arbitration, and even if they did, all proceedings before the arbitrator would be invalid u/s 35 of the Indian Arbitration Act.

6. For the reasons given above, we are unable to interfere with the order made by the learned District Judge and this Rule must accordingly be discharged with costs to opposite party No. 1.

B.K. Guha, J.

7. I agree.